December 7, 2018

Via ECFS
Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Subject: *Petitions for Reconsideration of CAF-II Metrics Order*
WC Docket No. 10-90

Dear Ms. Dortch:

This letter summarizes the state of the record on the petitions for reconsideration of the *Metrics Order*[1] filed by Hughes Network Systems, LLC ("Hughes")[2] and Viasat, Inc. ("Viasat").[3] It also specifically responds to assertions made by Viasat in its recent filing[4] contesting Hughes's opposition[5] to the Viasat Petition. As discussed in more detail below, the Commission will best promote efficient and accurate outcomes in universal service support auctions if it safeguards the bedrock principle that the standards applicable to auction participants must be clear before an auction begins and should not be substantively changed after an auction is over. It can do so by denying the Viasat Petition and granting the Hughes Petition.

To understand the debate regarding the Hughes Petition and the Viasat Petition, it is important to consider the chronology of the information that the Commission provided to prospective bidders in the New NY Broadband Program auction and the Connect America Fund Phase II ("CAF-II") auction regarding the obligation that high-latency bidders demonstrate voice quality on their networks satisfying a Mean Opinion Score ("MOS") of at least 4.[6] The timeline is set out below:

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[1] *Connect America Fund*, WC Docket No. 10-90, Order, DA 18-710 (WCB, WTB, OET rel. July 6, 2018) ("*Metrics Order*").
[2] Hughes, Petition for Clarification, or in the Alternative, Reconsideration, WC Docket No. 10-90 (filed Sept. 18, 2018), https://ecfsapi.fcc.gov/file/10919683808834/Hughes'%20Petition%20for%20Clarification%20or%20Recon.pdf ("Hughes Petition").
[3] Petition for Reconsideration of Viasat, Inc., WC Docket No. 10-90 (filed Sept. 19, 2018) ("Viasat Petition").
[4] Reply of Viasat, Inc. in Support of Its Petition for Reconsideration, WC Docket No. 10-90 (filed Nov. 19, 2018) ("Viasat Reply").
[5] Opposition of Hughes Network Systems LLC to Petition for Reconsideration by Viasat, Inc., WC Docket No. 10-90 (filed Sept. 18, 2018), https://ecfsapi.fcc.gov/file/110743558115/Hughes%20Opp%20to%20Viasat%20PFR%20Metrics%20Order.pdf ("Hughes Opposition").
[6] *See, e.g., Connect America Fund et al.,* Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5961 ¶ 30 (2016).

Date	Release	Action
5/26/16	FCC 16-64 *CAF-II Order*	• High-latency bidding tier established for CAF-II auction. • High-latency bidders must: o Show 95% or more of all peak period latency measurements at or below 750 ms. o "Demonstrate a score of four or higher using the [MOS]." "[S]ubmit laboratory testing consistent with the International Telecommunications Union recommendations P.800," which includes both listening-opinion and conversational-opinion tests.[7]
7/5/16		• ADTRAN Petition for Clarification or Reconsideration asks FCC to specify that only conversational-opinion test component of ITU-T P.800 standard should be permitted.
1/26/17	FCC 17-2 *NY Waiver Order*	• CAF support offered in NY to be distributed through the New NY Broadband Program auction. • NY must allow high-latency bidders and "satellite providers must be given the opportunity to compete." • High-latency bidders must: *[identical to FCC 16-64]* o Show 95% or more of all peak period latency measurements at or below 750 ms. o "Demonstrate a score of four or higher using the [MOS]." "[S]ubmit laboratory testing consistent with the International Telecommunications Union recommendations P.800."
8/15/17	*NY Auction*	• Final deadline for bids in New NY Broadband Program auction.
1/31/18	FCC 18-5 *CAF-II Recon Order*	• "[W]e clarify that the Commission has not yet specified which of the methods for subjective determination of transmission quality identified in ITU-T Recommendation P.800 should be used to demonstrate compliance with the second part of the two-part standard (MOS of four or higher)." • "We find that there is *insufficient information in the record to specify* which of the ITU's recommended options applicants should be prepared to use to demonstrate an MOS of four or higher." (emph. added) • "We expect that the specific methodology will be adopted by the Bureaus and the Office of Engineering and Technology by June 2018."
		• *[No comment is sought.]* • *[No new information enters the record.]*
2/1/18	FCC 18-6	• CAF-II Auction Procedures PN released.
7/6/18	DA 18-710 *Metrics Order*	• "We agree with ADTRAN that listening-opinion tests would not suffice to demonstrate a high-quality consumer voice experience…. Therefore, we require that high-latency providers conduct an ITU-T Recommendation P.800 conversational-opinion test…. Specifically, we require the use of the underlying conversational-opinion test

[7] The ITU-T P.800 specification establishes both listening-opinion and conversational-opinion tests. *See* International Telecommunication Union, Telecommunication Standardization Sector, Series P: Telephone Transmission Quality, Methods for objective and subjective assessment of quality, P.800 (Aug. 1996).

		requirements specified by the ITU-T Recommendation P.800, with testing conditions as described below" (specifying use of operational network infrastructure and actual customer locations and end-user equipment, which differs from the P.800 specifications).
7/16/18 7/19/18		• Hughes ex parte letters to FCC express concerns about the impact of requiring use of the conversational-opinion test and noting that the *Metrics Order*'s changes to the P.800 protocol cannot be applied to NY auction which was already completed.
7/23/18		• Viasat ex parte letter to FCC express concern about *Metrics Order.*
7/24/18- 8/21/18	CAF-II Auction	• CAF-II Auction bidding period.
9/15/18		• Long-form applications due committing winning bidders to CAF-II auction winning bids.
9/19/18		• Due date for petitions for reconsideration of *Metrics Order*. o Hughes Petition filed. o Viasat Petition filed

This timeline graphically demonstrates what Hughes explained in its reply in this proceeding – that, at the time of the New York auction, bidders had available to them only the information that MOS testing must be conducted using the ITU-T P.800 standard, which includes both the listening-opinion and conversational-opinion tests.[8] The *Metrics Order* does not state that it applies to winners in the New York auction, and it should not apply. Application of the modifications to the P.800 standard in the *Metrics Order,* released nearly a year after the New York auction was completed, to winning bidders in the New York auction would fundamentally change the parameters under which high-latency bidders would be required to demonstrate their compliance with basic auction requirements. As a result, it would pull the foundation out from under assumptions bidders made in formulating their bidding strategy, eliminating the allocative efficiency of the auction result. In particular, it would impair the rights that Hughes obtained when it won areas in the New York auction and impose new duties on its already-completed transactions with New York State regarding its commitments to serve those areas.

The timeline also graphically shows that bidders in the nationwide CAF-II auction, including Viasat, were well informed of the *Metrics Order* and the new obligations that it imposed *before* the CAF-II auction began. As a result, granting Viasat's petition to change the terms of the *Metrics Order* now, after the CAF-II auction is completed, would have similarly deleterious effects on parties' expectations and the outcome of the auction as a whole.

In its reply, Viasat first asserts that "Hughes cannot credibly claim to have had any 'settled expectations' as to the implementation of the 'conversational-opinion test' discussed in the *[Metrics] Order*" because the order said the Bureau would provide further guidance regarding its implementation, and both Viasat and Hughes had filed letters with the Commission raising concerns shortly after the *Metrics Order* was released.[9] The provision of the order that Viasat cites, however, suggests that Bureau guidance would be forthcoming about relatively minor aspects of latency testing not relevant to either Viasat's or Hughes's petitions for reconsideration—

[8] Reply of Hughes Network Systems, LLC to Oppositions and Comments on Petitions for Reconsideration, WC Docket No. 10-90 (filed Nov. 19, 2018) at 4-9 ("Hughes Reply").
[9] Viasat Reply at 2-3.

specifically, how to select customers for latency testing and collect test data from them.[10] This caveat hardly casts material elements of the latency testing regime into question. And if Viasat is suggesting that sending a letter to the Commission raising concerns about an adopted order, however "critical" those concerns may be,[11] undermines the enforceability of the order, Viasat significantly overestimates the weight of its advocacy. While the Commission's orders can create uncertainty regarding the law, a party's filings, taken alone, cannot. Hughes, presumably like Viasat, hoped that the Commission would respond to its letter prior to the auction, *but the Commission elected not to do so*. As such, at the time of the auction, the *Metrics Order* was in full force and effect and parties were obligated to rely upon it.

Viasat also exaggerates Hughes's position beyond all recognition in arguing that "Hughes's unilateral decision not to bid cannot serve as a basis for denying Viasat's petition for reconsideration."[12] The basis for denying Viasat's petition for reconsideration is not any action by Hughes, but rather the core principle that parties should be able to rely on Commission orders in effect at the time of an auction. Contrary to Viasat's suggestion, Hughes was under no obligation to seek a stay of the auction[13] before it conformed its bidding (or lack thereof) to the agency's existing rules at the time of the auction.

In response to Hughes's observation that granting Viasat's petition would lead to "inequities among applicants," Viasat asserts that it simply seeks through its petition to ensure "competitive and technological neutrality" among CAF support recipients.[14] This misses the point. Hughes does not dispute that modifications to the MOS testing framework might make it fairer. Indeed, Hughes strongly supports *prospective* modifications to the MOS testing framework *for future auctions,* such as the Remote Areas Fund auction. Such modifications should be based on a complete record and should be published well in advance of such auctions. The point is that making any such changes *after the auction is over*, as Viasat urges, prevents the benefits of such changes from being reflected in parties' bidding behavior.[15] Forcing market actors to make purchasing decisions without knowing the obligations associated with them is both unfair and inefficient.[16]

Contrary to Viasat's characterization, Hughes does not take the position that "a party's subjective 'expectations' with respect to a particular ruling forever prevents the agency from reconsidering that ruling."[17] Rather, Hughes simply asks the Commission not to make substantive changes to the fundamental objective obligations of participants in a universal service auction after

[10] *Metrics Order* at ¶ 45 & n.130.
[11] Viasat Reply at 3.
[12] *Id.* at 4.
[13] *Id.*
[14] *Id*.
[15] Viasat also fails to acknowledge that, in noting that granting Viasat's petition would lead to "inequities among applicants," Hughes was *directly quoting* Viasat's own petition to deny in another proceeding. Hughes Answer at 4. Viasat misses the opportunity to explain the intellectual inconsistency of its two positions.
[16] And Viasat's assertion that the Hughes Petition seeks any more "special treatment" than the Viasat Petition is spurious—just as Hughes was the only high-latency winning bidder in the New York auction, Viasat was the only high-latency winning bidder in the CAF-II auction. But granting Viasat's petition would benefit only Viasat, while granting Hughes's petition would safeguard the results of the auction process.
[17] Viasat Reply at 5.

bidding has concluded.[18] In this regard, Viasat cites court cases holding that "*even* a regulatory change 'that upsets expectations…may be sustained if its reasonable,' and that 'the Commission is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest … if it gives a reasoned explanation for the revision.'"[19] This is the test for "secondary retroactivity" applied in retroactive rulemaking cases such as the cases Viasat cites.[20] In fact, Hughes has demonstrated that application of the *Metrics Order*'s modifications to the P.800 standard to the New York auction would constitute *primary* retroactivity—that is, it would violate the outright ban on retroactive rulemaking.[21] As Justice Scalia pointed out, "[i]t is erroneous … to extend this 'reasonableness' inquiry [which Viasat cites] to purported rules that not merely affect past transactions but change what was the law in the past."[22] And, to the extent that the *Metrics Order* is interpreted to apply to the NY auction, it would unquestionably change what the law was in the past. It would take a gating requirement for auction participation adopted in 2016—that high-latency bidders show a MOS score of 4 or greater using the ITU-T P.800 protocol—and make that requirement significantly more difficult, potentially impossible, for satellite providers to meet.[23]

This is in stark contrast to the post-auction change in the service rules for the 800 MHz band which the D.C. Circuit upheld in *Mobile Relay Associates,* which Viasat also cites.[24] In that case, years after awarding some 800 MHz licenses by auction, the Commission changed some of the service rules for the band, which the petitioner claimed amounted to retroactive rulemaking that upset the expectations that underlay its auction bids.[25] The D.C. Circuit rightly observed that "the effect of the *Rebanding Decision* is purely prospective"[26]—in sharp contrast to the *Metrics Order*'s explicit modification of a rule adopted two years earlier that established a fundamental obligation on auction bidders. The *Metrics Order*'s alteration of the ITU-T P.800 standard did not just reflect a prospective rule change, it significantly changed the significance of a rule adopted in 2016 that affected parties' past bidding decisions. If applied to the New York auction, it would thus constitute impermissible retroactive rulemaking.

The court in *Mobile Relay Associates* also found (in the passage cited by Viasat) that the petitioner had not satisfied the standard for "secondary retroactivity," "which occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation."[27] Secondarily retroactive rules are upheld if they are "reasonable," and the Commission had clearly articulated a public interest basis for the new 800 MHz rules and provided a reasoned explanation for changing them.[28] Here, the Bureaus' adoption of the modifications to the P-800 protocol does not even satisfy the low bar of the reasonableness standard. As Hughes has shown, the Bureaus adopted the change on the basis of a record that the full Commission had

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[18] Moreover, Hughes's expectations were not "subjective." Hughes simply anticipated that the Commission would enforce its rules and orders in effect at the time of the auction. In fact, it was Viasat's expectations that were subjective—apparently believing that the Commission would change the rule to some extent following the auction.

[19] Viasat Reply at 5, quoting *DIRECTV v. FCC,* 110 F.3d 816, 826 (D.C. Cir. 1997) (internal citations and quotations omitted).

[20] *See id.*

[21] *See* Hughes Petition at 6-7; Hughes Reply at 12-16.

[22] *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 220 (1988) (Scalia, J., concurring).

[23] *See* Hughes Reply at 2, 6-7 (discussing the ITU-T computational model G.107 which predicts that networks with 600 ms roundtrip latency, such as satellite networks, can achieve at best a 3.72 MOS score using the conversational-opinion test).

[24] Viasat Reply at 5, citing *Mobile Relay Associates v. FCC,* 457 F.3d 1 (D.C. Cir. 2006).

[25] *Mobile Relay Associates,* 457 F.3d at 10-11.

[26] *Id.* at 11.

[27] *Id.*

[28] *Id.*

found to be "insufficient" on the issue and failed to explain their change in course on the adequacy of the record.[29]

Ultimately, the Hughes Petition and the Viasat Petition present interrelated issues raising questions of both policy and law. From a policy perspective, the petitions squarely present the question of whether participants in the Commission's universal service support auctions can count on Commission statements about the fundamental obligations of auction participants at the time of the auction. If they cannot, the Commission's support auctions cannot be relied upon to produce efficient (or even meaningful) results. From a legal perspective, the petitions raise the question of whether the Commission can retroactively change the meaning of a gating criterion for a support auction after the auction is over. Here too the answer is clear—the Commission cannot. Thus, for reasons of both policy and law, the Hughes Petition must be granted and the Viasat Petition must be denied.

Please direct any questions regarding this filing to the undersigned.

Sincerely,

/s/
Jennifer A. Manner
Senior Vice President, Regulatory Affairs

cc: Chelsea Fallon
Kirk Burgee
Sue McNeil
Ryan Palmer
Suzanne Yelen
Alexander Minard

[29] Hughes Answer at 11-12.